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# The Role of the Rome Statute in the Criminalization of Apartheid

Paul Eden \*

## Abstract

*The article challenges the assertion that the apartheid system in South Africa was a crime against humanity under customary international law giving rise to individual responsibility prior to the drafting of the 1998 Rome Statute of the International Criminal Court. The article also examines the role of the Rome Statute in the criminalization of apartheid and assesses the current status of the crime of apartheid in customary international law with particular reference to the principle of legality (nullum crimen, nulla poena sine lege). Nothing in the article should be read as condoning the gross violations of human rights that resulted from the policies of apartheid in South Africa in any way.*

## I. Introduction

Few political institutions in history have received as much universal condemnation as the apartheid policies of South Africa. The harrowing testimonies heard by the South African Truth and Reconciliation Commission (TRC) show that this condemnation was well founded. Unfortunately the attempts to criminalize apartheid by the international community before the drafting of the 1998 Rome Statute of the International Criminal Court<sup>1</sup> (hereinafter Rome Statute) lacked the specificity that penal legality requires and, additionally, the failure of significant numbers of states to ratify the relevant Conventions (before the drafting of the Rome Statute) prevented the creation of a customary norm. This article examines the role of the Rome Statute in the criminalization of apartheid and assesses the current status of the crime in customary international law with particular reference to the principle of legality (*nullum crimen, nulla poena sine lege*).

This article challenges the dominant narrative<sup>2</sup> that the apartheid system in South Africa was a crime against humanity under customary international law giving

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\* Lecturer in Law, University of Sussex. I would like to acknowledge the support and encouragement I received from a number of friends and colleagues including Craig Barker, Jo Bridgeman, John Dugard, Matthew Happold, Gideon Rossouw and Mark Walters. Their support should not, however, be understood as agreement with the views expressed in this article.

<sup>1</sup> The Rome Statute of the International Criminal Court (adopted 17 July 1998, entered in force 1 July 2002) 2178 UNTS 3 (ICCSt.).

<sup>2</sup> See e.g. T. McCormack and G. Simpson, 'The International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind: An Appraisal of the Substantive Provisions', 5 *Criminal*

rise to individual criminal responsibility.<sup>3</sup> However nothing in this article should be read as condoning the gross violations of human rights that resulted from the policies of apartheid in South Africa. The contemporary significance of the topic should not be underestimated either because, notwithstanding the formal end of apartheid in South Africa in 1994, the term continues to be applied in a number of contexts (particularly in relation to Israel and Palestine)<sup>4</sup> and consequently remains important in understanding the legal basis of a continuing rhetorical discourse.

The unique element in the criminalization of apartheid at the international level was that it sought to impose individual criminal responsibility on conduct that was explicitly lawful in the territory in which it occurred. It is hoped that a forensic examination of the process of criminalization of a particularly egregious form of systematic racial discrimination may prove useful should the international community be minded to criminalize similar conduct (such as systematic discrimination on the grounds of sexual orientation) in the future.

Given the widespread human suffering that resulted from the policies of apartheid in South Africa, the wish to label these policies as a crime against humanity as part of a process of stigmatization (and delegitimization) is entirely understandable. The desire to apply this toxic label to similar examples of widespread human suffering is equally understandable. However, with regard to the crime of apartheid, there has been a marked tendency to 'short-circuit' the voluntarist approach to the creation of customary international criminal law and a willingness to present 'oughts' (*de lege ferenda*) as 'ises' (*lex lata*).<sup>5</sup>

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*Law Forum (CLF)* (1994) 1-55, at 42 and K. Askin, 'Crimes Within the Jurisdiction of the International Criminal Court', 10 *CLF* (1999) 33-59, at 48.

<sup>3</sup> Some South African apartheid era academics also challenged the legal status of the crime of apartheid. See e.g. H. Booysen, 'Convention on the crime of *Apartheid*', 2 *South African Yearbook of International Law* (1976) 56-96 and G. Barrie, 'The apartheid convention after five years', *Tydskrif vir die Suid-Afrikaanse Reg* [1981] 280-283.

<sup>4</sup> See e.g. J. Carter, *Palestine: Peace not Apartheid* (Simon & Schuster Inc., 2006); V. Tilley (ed.), *Occupation, Colonialism, Apartheid? A re-assessment of Israel's practices in the occupied Palestinian territories under international law* (Human Sciences Research Council of South Africa, 2009); B. White, *Israeli Apartheid: A Beginner's Guide* (Pluto Press, 2009); R. Goldstone, 'Israel and the Apartheid Slander', *The New York Times*, 1 November 2011, A27; V. Tilley (ed.), *Beyond Occupation: Apartheid, Colonialism and International Law in the Occupied Palestinian Territories* (Pluto Press, 2012); and J. Dugard and J. Reynolds, 'Apartheid, International Law and the Occupied Palestinian Territory', 24 *European Journal of International Law (EJIL)* (2013) 867-913.

<sup>5</sup> See D. Robinson, 'The Identity Crisis of International Criminal Law', 21 *Leiden Journal of International Law* (2008) 925-963 for a valuable examination of 'the assumptions and reasoning techniques that lead ILC into internal contradictions with its own declared principles' (at 927).

The advantages of insisting on a traditionalist methodology in the context of ascertaining the status of the crime of apartheid in customary international law are twofold. First, it preserves a foundational premise of international criminal law: the principle of legality (*nullum crimen, nulla poena sine lege*)<sup>6</sup> and, secondly, it acknowledges that the normative force of transformative initiatives will always need to be rooted in the social reality of state practice. In this context, the incorporation of new international crimes into the domestic criminal law of states is essential to ensure both normative alignment and source legitimacy for these transformative initiatives.

Part II of this article examines the international legal instruments that sought to criminalize apartheid *prior* to the drafting of the Rome Statute, notably the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity<sup>7</sup> (the 1968 Convention) and the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid<sup>8</sup> (the Apartheid Convention), as well as Additional Protocol I to the Geneva Conventions<sup>9</sup> and the International Law Commission's 1996 Draft Code of Offences Against the Peace and Security of Mankind (1996 Draft Code). Part II will also consider the finding that apartheid was a crime against humanity in the Final Report of the South African Truth and Reconciliation Commission with particular reference to the *Memorandum of Law in Support of Concluding that Apartheid is a Crime Against Humanity* submitted by a group of 21 international jurists.<sup>10</sup> Part III addresses the process by which the crime of apartheid was included in the Rome Statute. Part IV considers the principle of legality in the context of the international crime of apartheid and Part V concludes by assessing the current status of the crime of apartheid (as a crime against humanity) under customary international law.

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<sup>6</sup> See, further, G. Acquaviva, 'At the Origins of Crimes Against Humanity: Clues to a Proper Understanding of the *Nullum Crimen* Principle in the Nuremberg Judgment', 9 *Journal of International Criminal Justice (JICJ)* (2011) 881-903 and *Korbeley v. Hungary*, ECtHR [GC], Appl. No. 9174/02, 19 September 2008 (2010) 50 EHRR 48.

<sup>7</sup> The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (adopted 26 November 1968, entered in force 11 November 1970) 754 UNTS 73 (1968 Convention).

<sup>8</sup> The International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted 30 November 1973, entered in force 18 July 1976) 1015 UNTS 243 (Apartheid Convention).

<sup>9</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered in force 7 December 1978) 1125 UNTS 3 (Additional Protocol I).

<sup>10</sup> See R. Slye, 'Apartheid as a Crime Against Humanity: A Submission to the South African Truth and Reconciliation Commission', 20 *Michigan Journal of International Law* (1999) 267-300.

## **II. The Crime of Apartheid prior to the Rome Statute**

### **A. Introduction**

Although the term apartheid is usually used to describe the South African policy of racial classification and segregation between 1948 and 1994 (the apartheid era), the practice of racial discrimination in South Africa pre-dates the coming to power of the Nationalist Party in 1948. The first United Nations General Assembly (UNGA) resolution expressing concern regarding racial discrimination in South Africa was passed in December 1946.<sup>11</sup> What distinguishes the apartheid era is the systematic manner in which the Nationalist Party formalized their policies of racial discrimination through legislation and the brutality of the enforcement mechanisms established to implement them.

In the early UNGA debates over the question of apartheid in South Africa, the controversy over the scope and application of the principle of domestic jurisdiction<sup>12</sup> was particularly evident.<sup>13</sup> Only after the Sharpeville Massacre on 21 March 1960 did the UNGA finally condemn South Africa for being in wilful breach of its obligations under Article 56 of the UN Charter.<sup>14</sup> From 1966 the UNGA began to condemn the policies of apartheid as practised in South Africa as a crime against humanity.<sup>15</sup> These UNGA resolutions attracted few negative votes (usually only Portugal and South Africa) but a significant number of abstentions. The first reference to apartheid as a crime against humanity occurred in 1965 in a UNGA resolution relating to South West Africa.<sup>16</sup> A slightly earlier UNGA resolution in 1965 also condemned the policies of racial segregation practised in Southern Rhodesia as a crime against humanity, although this resolution attracted a significantly higher number of negative votes (nine) than similar UNGA resolutions condemning South Africa's apartheid policies at the time.<sup>17</sup>

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<sup>11</sup> 'Treatment of Indians in the Union of South Africa', UNGA Res. 44(I), 8 December 1946.

<sup>12</sup> Art. 2(7) UN Charter.

<sup>13</sup> See R. Higgins, *The Development of International Law through the Political Organs of the United Nations* (Oxford University Press, 1963), at 120-123.

<sup>14</sup> UNGA Res. 1598 (XV), 13 April 1961.

<sup>15</sup> See UNGA Res. 2202A (XXI), 16 December 1966 and UNGA Res. 2671F (XXV), 8 December 1970.

<sup>16</sup> 'Question of South West Africa', UNGA Res. 2074 (XX), 17 December 1965.

<sup>17</sup> 'Question of Southern Rhodesia', UNGA Res. 2022 (XX), 5 November 1965.

The first condemnation of apartheid in an internationally binding legal instrument can be found in the 1966 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).<sup>18</sup> Article 3 of ICERD requires state parties to ‘condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction’. Contrary to some assertions,<sup>19</sup> Article 3 of ICERD does not oblige states party to the Convention to recognize apartheid as a crime against humanity nor does it attempt to assert extra-territorial jurisdiction. The first attempt to criminalize apartheid in a legally binding international instrument was made two years later, during the drafting of the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (the 1968 Convention).

***B. The 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity***

On 26 November 1968, the UNGA adopted a draft convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (the 1968 Convention).<sup>20</sup> Article 1(b) of this Convention provides (*inter alia*) that no statutory limitation will apply to ‘inhuman acts resulting from the policy of apartheid ... even if such acts do not constitute a violation of the domestic laws of the country in which they were committed’.<sup>21</sup> The UNGA resolution adopting the draft 1968 Convention was approved by 58 votes in favour, seven against and 36 abstentions. As Miller notes, ‘[m]ore opposing votes were cast against the adoption of this convention than voted in opposition to any prior international human rights instrument.’<sup>22</sup>

The main criticism made by states during the drafting of the 1968 Convention was that the statement in Article I that statutory limitation would not apply to the listed crimes ‘irrespective of the date of their commission’ failed to respect the principle of legality (*nullum crimen, nulla poena sine lege*). The wording of the

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<sup>18</sup> International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered in force 4 January 1969) 660 UNTS 195 (ICERD).

<sup>19</sup> See R. Kok, *Statutory Limitations in International Criminal Law* (T.M.C. Asser Press, 2007), at 98 (quoting the argument of The Netherlands during the drafting of the 1968 Convention).

<sup>20</sup> UNGA Res. 2391 (XXIII), 26 November 1968.

<sup>21</sup> The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (adopted 26 November 1968, entered in force 11 November 1970) 754 UNTS 73.

<sup>22</sup> R. Miller, ‘The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity’, 65 *American Journal of International Law (AJIL)* (1971) 476-501, at 477.

definition of crimes against humanity was also regarded as problematic by a number of states. The problems associated with the wording of the 1968 Convention has meant that it has had a somewhat limited effect and (to date) it has only been ratified by 54 countries.

The 1968 Convention is an important milestone on the road to recognizing that crimes against humanity can be committed outside the context of an international armed conflict, but it cannot — by itself — be regarded as recognizing the existence of apartheid as an international crime against humanity for two reasons. First, the voting record demonstrates a clear lack of consensus on the issue and, secondly, it is doubtful that a convention whose sole purpose is to require states not to apply a rule of statutory limitation to a disputed categorization of crimes against humanity can *ipso facto* create a crime against humanity i.e. a convention providing for purely procedural matters cannot be used as a bootstrapping device to create a substantive offence.

Further, although the preamble to the 1968 Convention recalls that both the policies of apartheid and the violation of the economic and political rights of indigenous populations are crimes against humanity, Article I(b) only refers to ‘inhuman acts resulting from the policies of apartheid’. It can be argued that the 1968 Convention only recognizes the ‘inhuman acts’ carried out to enforce apartheid as crimes against humanity to which no statutory limitation shall apply rather than the policies of apartheid *per se*. There are no references to the economic and political rights of indigenous populations in the operative parts of the 1968 Convention.

The *Memorandum of Law in Support of Concluding that Apartheid is a Crime Against Humanity (Memorandum of Law)* submitted to the South African Truth and Reconciliation Commission (TRC) acknowledges that the 1968 Convention was not universally accepted but asserts that ‘forty of the forty-three countries that abstained or voted against the Statutory Limitations Convention did so on technical grounds having nothing to do with whether apartheid was a crime against humanity.’<sup>23</sup> It is disturbing to see the principle of legality (*nullum crimen, nulla poena sine lege*) described as a technicality and the voting record on this issue (which was combined with the reference to violations of the economic and political rights of an indigenous

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<sup>23</sup> See Slye, *supra* note 10, at 290.

population) was 59 to six with 25 abstentions.<sup>24</sup> The *Memorandum of Law* also fails to address the implications of the sparse ratification of the 1968 Convention in asserting its customary effect.

### **C. The Apartheid Convention**

Article I(1) of the Apartheid Convention provides that

The States Parties to the present Convention declare that *apartheid* is a crime against humanity and that inhuman acts resulting from the policies and practices of *apartheid* and similar policies and practices of racial segregation and discrimination, as defined in article II of the Convention, are crimes violating the principles of international law.

One question that has divided the commentators is the scope of application of the Apartheid Convention. Article II of the Apartheid Convention states that, 'For the purposes of the present Convention, the term "the crime of *apartheid*", which shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa, shall apply to the following inhuman acts ...'.<sup>25</sup>

The wording of Article II makes it clear that the Convention also applies to similar policies of racial discrimination as practised in South West Africa (now Namibia) and (Southern) Rhodesia (now Zimbabwe) and the wording of Article II is even wide enough to encompass Portuguese colonial policies in Mozambique and Angola.

The majority of the commentators regard the Apartheid Convention as 'limited in time and space'<sup>26</sup> but Dugard supports the argument that the Apartheid Convention was intended to apply more widely by reference to its endorsement in a wider context

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<sup>24</sup> See UN Doc. A/C.3/SR.1573, 15 October 1968, at 1-2.

<sup>25</sup> The Chinese, English, French, Russian, and Spanish texts of the Apartheid Convention are equally authentic (Art. XIX) and the equivalent French text reads as follows: '*Aux fins de la présente Convention, l'expression "crime d'apartheid", qui englobe les politiques et pratiques semblables de ségrégation et de discrimination raciales, telles qu'elles sont pratiquées en Afrique australe, désigne les actes inhumains indiqués ci-après ...*'.  
<sup>26</sup> A. Cassese, *International Criminal Law* (2nd edn., Oxford University Press, 2008), at 13. See also M.C. Bassiouni, *Introduction to International Criminal Law* (Transnational Publishers, 2003), at 145 and L. Reydam, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford University Press, 2003), at 59. For the views of the ILC in this regard see *infra* the text accompanying note 50.



in instruments adopted both before and after the fall of apartheid notably Additional Protocol I and the Rome Statute.<sup>27</sup> Dugard also notes that a number of states have ratified or acceded to the Apartheid Convention since the end of apartheid in South Africa.<sup>28</sup> With respect, neither the fact that subsequent international conventions abandon the apparent geographical restrictions contained in Article II of the Apartheid Convention (and, in the case of Additional Protocol I, this conclusion is doubtful) nor the fact that states continue to ratify the Apartheid Convention supports the contention that the Apartheid Convention itself was intended to apply to situations other than southern Africa. The first argument is a *non sequitor* and the second argument is based on an unsupported assumption about the reality of a causal connection that, even if it existed, could not rewrite the Apartheid Convention.

Clark submits that the Apartheid Convention was not intended to be limited to practices occurring in southern Africa on the grounds that Article II ‘is drafted so as to “include” the cases of southern Africa, but not exclusive to them’.<sup>29</sup> An examination of the *travaux préparatoires* of the Apartheid Convention does not support this interpretation. The initial draft of Article II did not contain the phrase ‘as practised in southern Africa’. During the drafting process, the representatives of Australia,<sup>30</sup> Cyprus<sup>31</sup> and the United States<sup>32</sup> raised the possible wider application of the Apartheid Convention as an example of an unintended consequence due to the vagueness of the drafting. The Moroccan representative agreed that Article II should be made clearer and she proposed that the phrase ‘as practised in southern Africa’

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<sup>27</sup> J. Dugard, ‘L’Apartheid’, in H. Ascensio, E. Decaux and A. Pellet (eds), *Droit International Pénal* (2nd edn., Pedone, 2012) 197-207, at 200.

<sup>28</sup> *Ibid.* Azerbaijan (1996), Georgia (2005), Guatemala (2005), Honduras (2005), Montenegro (2006), Paraguay (2005), Republic of Moldova (2005), Serbia (2001) and Uruguay (2012).

<sup>29</sup> R. Clark, ‘Apartheid’, in M.C. Bassiouni (ed), *International Criminal Law: Volume 1 – Sources, Subjects and Contents* (3rd edn., Martinus Nijhoff Publishers, 2008) 599-620, at 603. See also M.C. Bassiouni and D. Derby, ‘Final Report on the Establishment of an International Criminal Court for the Implementation of the *Apartheid* Convention and Other Relevant International Instruments’, 9 *Hofstra Law Review* (1980-1981) 523-592, at 530; I. Bantekas *International Criminal Law* (4th edn., Hart, 2010), at 236; and M. du Plessis, ‘International criminal law: The crime of apartheid revisited’, 24 *South African Journal of Criminal Justice* (2011) 417-428, at 423.

<sup>30</sup> See UN Doc. A/C.3/SR.2004, 23 October 1973, at 143 [§ 4].

<sup>31</sup> See UN Doc. A/C.3/SR.2003, 22 October 1973, at 142-143 [§ 39].

<sup>32</sup> See UN Doc. A/C.3/SR.2003, 22 October 1973, at 142 [§ 36].

should be added to draft Article II.<sup>33</sup> The proposed Moroccan amendment was adopted by 89 votes to three with 19 abstentions.<sup>34</sup>

Article II of the Apartheid Convention also states that the enumerated inhuman acts constituting the material elements of the crime of apartheid must be committed ‘for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them’. It does not appear that the precise ambit of the *mens rea* of the crime of apartheid was ever addressed during the drafting of the Apartheid Convention.<sup>35</sup> Clark denies that Article II requires evidence of specific intent on the grounds that ‘the principle of strict construction is arguably not a generally accepted mode of treaty analysis’<sup>36</sup> but Dugard challenges this view on grounds that strict interpretation in favour of the accused is a general principle of criminal law.<sup>37</sup>

Another controversial aspect of the Apartheid Convention is the question of universal jurisdiction. Article V states that a competent tribunal of any state party to the Apartheid Convention may try persons charged with ‘the crime of apartheid’ as defined in Article II if they have acquired jurisdiction over the person of the accused. This approach certainly implies that jurisdiction is based on universality but it is unclear on what basis this jurisdiction could have been applied to either South Africa, (Southern) Rhodesia or Portugal as non-parties to the Apartheid Convention. Article V of the Apartheid Convention also envisages the creation of an international penal tribunal having jurisdiction over the acts enumerated in Article II. Reydam's suggests that the incorporation of universal jurisdiction in the Apartheid Convention can be explained by reference to two factors. First, in 1973 there was even less prospect of establishing an international criminal court than there had been in 1948 and, secondly, the fact that the Apartheid Convention was drafted with the three white minority regimes in southern Africa in mind meant that state parties had little to fear from reciprocity.<sup>38</sup>

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<sup>33</sup> See UN Doc. A/C.3/SR.2005, 24 October 1973, at 150 [§ 12]. For the text of the Moroccan amendment see UN Doc. A/C.3/L.2020, 24 October 1973 (original French).

<sup>34</sup> See UN Doc. A/C.3/SR.2008, 26 October 1973, at 162.

<sup>35</sup> See Clark, *supra* note 29, at 604.

<sup>36</sup> *Ibid.*

<sup>37</sup> Dugard, *supra* note 27, at 203. This principle is reflected in Art. 22(2) ICCSt., regarded by some as a codification of existing customary law. See *Cassese's International Criminal Law*, revised by A. Cassese, P. Gaeta et al. (3rd edn., Oxford University Press, 2013), at 33.

<sup>38</sup> Reydam's, *supra* note 26, at 59.

The Apartheid Convention was adopted by the UNGA on 30 November 1973.<sup>39</sup> Although there are currently 108 parties to the Apartheid Convention, the customary status of the convention has been challenged on the grounds that ‘[i]n view of the refusal of most Western states to ratify the convention, its provisions should be considered to be legally binding only on the states parties.’<sup>40</sup> It is tempting to dismiss the reference to ‘Western states’ as Euro-centric but, as Tomuschat notes, ‘[t]he fact that the West has consistently rejected the Apartheid Convention proves that a universal *opinio iuris* is missing.’<sup>41</sup> As Bassiouni acknowledges, there are two essential and endemic problems with the Apartheid Convention. First, it appears intended to apply to southern Africa only, and, secondly, its definition of what constitutes the prohibited practices in Article II ‘is too broad and imprecise with regard to the requirements of penal legality and specificity.’<sup>42</sup>

#### **D. Additional Protocol I**

The diplomatic pressure to isolate South Africa and criminalize apartheid further was evident during the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts held in four sessions between 1974 and 1977 not least because 11 national liberation movements (including all the major national liberation movements engaged in armed conflicts in southern Africa) participated as observers. Additional Protocol I to the Geneva Conventions was adopted on 8 June 1977 and entered into force on 7 December 1978. There are currently 173 parties to Additional Protocol I.<sup>43</sup>

<sup>39</sup> UNGA Res. 3068 (XXVIII), 30 November 1973. The voting record (non-recorded) was 91-4-26. The four states that voted against the resolution were Portugal, South Africa, the United Kingdom and the United States. Dugard, *supra* note 27, at 198.

<sup>40</sup> H. Hannum, ‘Human Rights’ in C. Joyner (ed.), *The United Nations and International Law* (Cambridge University Press, 1997), at 144. See also C. Tomuschat, ‘Crimes Against the Peace and Security of Mankind and the Recalcitrant Third State’, 24 *Israel Yearbook on Human Rights* (1995) 41-62, at 54; E. Zoller, ‘La définition des crimes contre l’humanité’, 120 *Journal du droit international* (1993) 549-568, at 558 and Cassese, *supra* note 26, at 13.

<sup>41</sup> Tomuschat, *supra* note 40, at 55.

<sup>42</sup> M. Bassiouni, *International Crimes: Digest/Index of International Instruments 1815-1985*, Vol. 1 (Oceana Publications Inc., 1986), at 405. See also G. Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (2nd edn., Penguin Books, 2002), at 252-3 and A. Zahar, ‘Apartheid as an International Crime’, in A. Cassese et al. (eds), *The Oxford Companion to International Criminal Justice* (Oxford University Press, 2008) 245-246, at 246.

<sup>43</sup> As of 30 May 2013. See the ICRC International Humanitarian Law database, available online at <http://www.icrc.org/ihl> (visited 30 June 2013).

Article 85(4)(c) of Additional Protocol I states that the 'practices of *apartheid* and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination' are grave breaches of Protocol I when committed wilfully and in violation of Protocol I. The commentary notes that sub-paragraph (4) is concerned with 'off the battlefield' grave breaches and that, outside the scope of application of Additional Protocol I, the crime of apartheid remains exclusively within the domain of crimes against humanity.<sup>44</sup>

As noted above,<sup>45</sup> Dugard argues that the criminalization of the 'practices of *apartheid*' in Additional Protocol I lacks the geographical limitations contained in Article II of the Apartheid Convention but the *travaux préparatoires* do not support this assertion. Given the context (and timing)<sup>46</sup> of the drafting of Additional Protocol I, the inclusion of the 'practices of *apartheid*' in the list of grave breaches was inevitable although it was missing from the list of grave breaches in the draft Protocol I initially prepared by the International Committee of the Red Cross (ICRC). The list of grave breaches (that ultimately became Article 85 of Additional Protocol I) was adopted by consensus but several delegations questioned the feasibility of some of the provisions due to the vagueness of the drafting. The inclusion of the 'practices of *apartheid*' was singled out for criticism in this regard.<sup>47</sup>

There is no definition of the 'practices of *apartheid*' in Additional Protocol I itself and the *travaux préparatoires* reveal that the supporters of the addition of the 'practices of *apartheid*' to the list of grave breaches justified its inclusion primarily by reference to the Apartheid Convention (some references were also made to the 1968 Convention). It is therefore reasonable to conclude that the ambit of the material element of the 'practices of *apartheid*' cannot be wider than the crime of apartheid in the Apartheid Convention and that the requirement that the 'practices of *apartheid*'

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<sup>44</sup> Y. Sandoz et al. (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC-Martinus Nijhoff Publishers, 1987), at 1002.

<sup>45</sup> See text accompanying note 27 above. See also J. Dugard, *International Law: A South African Perspective* (4<sup>th</sup> edn., Juta & Co, 2011), at 159 ('That apartheid knows no geographical limitation is confirmed by the 1977 Additional Protocol I to the Geneva Conventions of 1949').

<sup>46</sup> The school student-led Soweto Uprising began on 16 June 1976. Over 170 people were killed and, on 19 June 1976, the UN Security Council adopted a resolution (by consensus) strongly condemning the South African government for its resort to violence against school children and affirming 'that the policy of apartheid is a crime against the conscience and dignity of mankind'. SC Res. 392 (1976).

<sup>47</sup> Summary Record of the 64<sup>th</sup> Meeting, 7 June 1976, CDDH/I/SR.60, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977)*, Volume IX (Bern: Federal Political Department, 1978), at 307 [§ 9] (Austria), at 310 [§ 28] (Australia), at 310 [§ 29] (France), at 316 [§ 64] (Finland).

must be committed wilfully and in violation of the Conventions or Additional Protocol I is, arguably, considerably narrower than some interpretations of the *mens rea* elements of the crime of apartheid in the Apartheid Convention.

***E. Draft Code of Crimes Against the Peace and Security of Mankind***

In 1983 the International Law Commission (ILC) returned to the question of the Draft Code of Offences Against the Peace and Security of Mankind (originally prepared by the ILC in 1954) at its 35<sup>th</sup> session in Geneva. In its analytical paper, the ILC made reference to the views of a large number of representatives (20 states) that the future Code should be broadened to take account of developments since 1954 and that special emphasis should be placed in the proposed Code on the crime of apartheid.<sup>48</sup>

In 1991 the ILC adopted, on first reading, a draft code of Crimes against the Peace and Security of Mankind that included the crime of apartheid (draft article 20).<sup>49</sup> The commentary notes that the definition of the crime of apartheid contained in draft article 20 was based, both in letter and in spirit, on article II of the 1973 Apartheid Convention but that the ILC did not want to limit the scope of the definition in the draft article by references to southern Africa, as was the case in article II of the 1973 Apartheid Convention.<sup>50</sup>

There is no explicit reference to apartheid in the final text of the 1996 Draft Code of Crimes against the Peace and Security of Mankind (1996 Draft Code) adopted by the ILC at its 48<sup>th</sup> session.<sup>51</sup> However draft Article 18(f) includes ‘institutionalized discrimination on racial, ethnic or religious grounds’ amongst the systematic or large scale acts that constitute crimes against humanity and the ILC commentary notes that this ‘is in fact the crime of apartheid under a more general denomination’.<sup>52</sup>

The *Memorandum of Law* makes reference to the 1996 Draft Code in support of its finding that apartheid was a crime against humanity under customary

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<sup>48</sup> *Draft code of offences against the peace and security of mankind - Analytical paper prepared pursuant to the request contained in paragraph 256 of the report of the Commission on the work of its thirty-fourth session*, UN Doc A/CN.4/365, 25 March 1983, at 29-30 [§ 91].

<sup>49</sup> *Draft Code of Crimes Against the Peace and Security of Mankind*, reprinted in [1991] *Yearbook of the ILC* Volume II (2) 79-107.

<sup>50</sup> *Ibid.*, at 103 [§ 4].

<sup>51</sup> *Draft Code of Crimes against the Peace and Security of Mankind (1996)*, reprinted in [1996] *Yearbook of the ILC* Volume II (2) 15-56.

<sup>52</sup> *Ibid.*, at 49 [§ 12].

international law<sup>53</sup> but ignores the controversy that surrounded the ILC's work in this regard.

Suffice it to say that this five-decade effort was controversial from the start, although it was not put out of its misery until 1996 when the Commission "concluded" its work with a "Code".<sup>54</sup>

#### ***F. The South African Truth and Reconciliation Commission and the Crime of Apartheid***

In 1995 the South African Truth and Reconciliation Commission (TRC) was established to establish the nature, causes and extent of the gross violations of human rights committed from 1 March 1960 to the cut-off date (10 May 1994) and to grant amnesty to persons who made full disclosure of all criminal offences (or delicts) falling within a number of prescribed categories and committed with a political objective during that period provided that the formal requirements of the amnesty process had been complied with.<sup>55</sup>

In its *Final Report*, the TRC affirmed that, in its judgment, apartheid, as a system of systematic racial discrimination, was a crime against humanity under international law.<sup>56</sup> The TRC also stated that in making its findings 'the Commission was guided by international humanitarian law and the Geneva Conventions'.<sup>57</sup> The Appendix (in Volume 1) containing the TRC's finding that apartheid was a crime against humanity acknowledges *The Memorandum of Law in Support of Concluding that Apartheid is a Crime Against Humanity (Memorandum of Law)* submitted by a group of 21 international jurists as well as the comments of Professor John Dugard.<sup>58</sup>

The problem with the TRC's conclusion that apartheid was a crime against humanity is that South Africa did not vote in favour of any of the international

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<sup>53</sup> See Slye, *supra* note 10, at 278.

<sup>54</sup> R. Clark, 'History of Efforts to Codify Crimes Against Humanity: From the Charter of Nuremberg to the Statute of Rome', in L. Sadat (ed.), *Forging a Convention for Crimes Against Humanity* (Cambridge University Press, 2011) 8-27, at 15.

<sup>55</sup> The Promotion of National Unity and Reconciliation Act No. 34 of 1995, reproduced in J. Grant and C. Barker, *International Criminal Law Deskbook* (Cavendish Publishing, 2006) 381-403.

<sup>56</sup> *Truth and Reconciliation Commission of South Africa Report* (Truth and Reconciliation Commission, 1998) Volume 1, at 94 [§ 1] (hereinafter *TRC Report*) and Volume 5, at 222.

<sup>57</sup> *Truth and Reconciliation Commission of South Africa Report* (Truth and Reconciliation Commission, 2003) Volume 6, at 593 [§ 18].

<sup>58</sup> *TRC Report* Volume 1, *supra* note 56, at 94 fn. 29.

resolutions labelling apartheid as a crime against humanity (and the legal effect of these UNGA and Security Council resolutions is questionable in any event) nor was it a party to any of the international conventions that categorized apartheid as a crime against humanity prior to 1995. This crucial issue is not dealt with in the TRC's *Final Report* but is addressed by both Professor Dugard and the 21 international jurists who drafted the *Memorandum of Law*.

*The Memorandum of Law* asserts that systematic racial discrimination (including apartheid) is a violation of a *jus cogens* norm of international law, that *jus cogens* norms bind all states and, that no state may 'opt out' of (or persistently object to) a *jus cogens* norm.<sup>59</sup> There are two difficulties with these assertions. The first difficulty is that the proposition that needs to be proven (i.e. 'that the prohibition on apartheid is a peremptory norm, a norm of *jus cogens*, to which the normal rules relating to persistent objection are inapplicable'<sup>60</sup>) is explicitly assumed in the premise. This is a type of logical fallacy known as begging the question or *petito principii* (assuming the initial point). The second difficulty is that even if systematic racial discrimination is a violation of *jus cogens*, this fact does not of itself create an international crime involving individual criminal responsibility.<sup>61</sup>

With regard to the first difficulty, as Ragazzi notes, 'one would be inclined to accept without question the proposition that no persistent objection to [the international prohibition of apartheid] is admissible; yet articulating the reasons for this conclusion is not easy.'<sup>62</sup> One possible rationale for the problem is that, according to Article 53 of the Vienna Convention on the Law of Treaties, a peremptory norm is 'a norm accepted and recognised by the international community of States *as a whole*' (emphasis added) and, thus, the presence of a non-consenting state would operate to prevent the emergence of a peremptory norm.<sup>63</sup> With regard to the second difficulty, if the international prohibition of apartheid was a *ius cogens* norm of international law

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<sup>59</sup> *Supra* note 10, at 289. See also E. Banks, *The State Immunity Controversy in International Law: Private Suits Against Sovereign States in International Law* (Springer, 2005), at 167.

<sup>60</sup> Dugard, *supra* note 45, at 29.

<sup>61</sup> See the ILC's Commentary on 1996 Draft Article 19, at § 17 (noting that a breach of a rule of *jus cogens* does not necessarily and automatically constitute an international crime).

<sup>62</sup> M. Ragazzi, *The Concept of International Obligations Erga Omnes* (Clarendon Press, 1997), at 71. See also R. Bernhardt, 'Custom and Treaty in the Law of the Sea', 205 *Hague Recueil* (1987-V) 247-330, at 269.

<sup>63</sup> See M. Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2005), at 324. But see also Merits, *Domingues v United States*, Case 12,285, Report 62/02, Inter-American Commission on Human Rights, 22 October 2002 at §§ 84-85.

that *ipso facto* created an international crime involving individual criminal responsibility, the granting of amnesties could be characterized as ‘opting out’ of the obligation to repress grave breaches of international humanitarian law.<sup>64</sup>

In *Azanian Peoples Organization (AZAPO) v. The President of South Africa*,<sup>65</sup> AZAPO and the relatives of a number of the victims sought to argue that the proposed amnesties were in breach both of the right to redress contained in the South African Interim Constitution as well as the equivalent provisions of the Geneva Conventions (I-IV) to which South Africa was a party. The South African Constitutional Court accepted that section 35(1) of the Interim Constitution required them to ‘have regard to public international law’ but held that it was doubtful that the Geneva Conventions (or the Additional Protocols) applied to the conflict under discussion.<sup>66</sup> The Court also stated that even if Additional Protocol II was applicable to the conflict, article 6(5) of that Protocol encouraged the granting of the ‘broadest possible amnesty to persons who have participated in the armed conflict’.<sup>67</sup>

### **G. Conclusion**

Notwithstanding the TRC’s findings regarding the status of the crime of apartheid, no one sought or was granted amnesty for the practices of apartheid itself but for the gross violations of human rights (that also constituted crimes under South African law) carried out in order to enforce apartheid. The absence of an explicit reference to ‘the crime of apartheid’ in the ILC’s 1996 Draft Code is indicative of a widespread belief that the end of apartheid in South Africa in 1994 had consigned both the concept and the attempts to criminalize it to history.

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<sup>64</sup> See, for example, *Case of Almonacid-Arellano et al v. Chile*, Inter-American Court of Human Rights, Judgment of 26 September 2006 (Preliminary Objections, Merits, Reparations and Costs), Series C, No. 154, at §§ 105-114 (‘crimes against humanity are crimes which cannot be susceptible of amnesty’).

<sup>65</sup> [1996] ZACC 16; 1996 (4) SA 671 (CC). See also J. Dugard, ‘Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question’, 13 *South African Journal on Human Rights* (1997) 258-268.

<sup>66</sup> At § 29 fn.29 (‘Even if the conflict in South Africa could be said to fall within ... [Additional Protocol I], ... [t]his Protocol was never signed or ratified by South Africa during the conflict’.).

<sup>67</sup> At § 30. But see also J. Dugard, ‘International Law and the South African Constitution’, 1 *EJIL* (1997) 77-92, at 89-91 (‘As apartheid has been labelled as a crime against humanity ..., it is surprising that no attempt was made to address the question whether customary international law requires the prosecution of those who commit this crime’).



### III. The Inclusion of the Crime of Apartheid in the Rome Statute

#### A. Introduction

The crime of apartheid was not included in the statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) (or of the International Criminal Tribunal for Rwanda (ICTR)) despite a request for it to be included from the ICRC.<sup>68</sup> The crime of apartheid was also missing from the list of crimes against humanity in the Draft Statute of the International Criminal Court produced by the Preparatory Committee on the Establishment of an International Criminal Court although the core concept undoubtedly falls within the concept of persecution on ‘political, racial, national, ethnic, cultural or religious’ grounds that was included in subparagraph (h) of proposed article Y (defining crimes against humanity).<sup>69</sup> By contrast, apartheid was initially included in the possible options for the proposed definition of war crimes as an example of an outrage upon personal dignity.<sup>70</sup>

The idea that the crime of apartheid should have been included in the list of crimes against humanity was originally made by the representative of Mexico.<sup>71</sup> The only recorded support for the Mexican proposal initially came from the representative of Ireland (on the grounds that apartheid was an example of a crime that could be committed outside the context of an armed conflict)<sup>72</sup> but it prompted the Chairman to note that ‘[i]t had been suggested that the crime of apartheid should be added to the list [of crimes against humanity]’.<sup>73</sup> At a subsequent meeting, several delegations expressed support for the express inclusion of apartheid in the list of war crimes.<sup>74</sup>

With regard to both ‘enforced disappearances’ and ‘the crime of apartheid’ (acts not previously proscribed by major precedents), there was some initial reluctance to including them in the Rome Statute’s definition of crimes against

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<sup>68</sup> C. Hall, ‘(h) “The crime of apartheid”’, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (2nd edn., C.H. Beck/Hart/Nomos, 2008), at 228 fn. 332.

<sup>69</sup> See the Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/2/Add.1, 14 April 1998, at 26.

<sup>70</sup> *Ibid.*, at 20.

<sup>71</sup> ‘Third Meeting of the Committee of the Whole’, UN Doc. A/CONF.183/C.1/SR3, 17 June 1998, *UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June-17 July 1998) Official Records Volume II, Summary records of the plenary meetings and of the meetings of the Committee of the Whole*, at 152 [§ 125].

<sup>72</sup> *Ibid.*, at 153 [§ 167].

<sup>73</sup> *Ibid.*, at 154 [§ 178].

<sup>74</sup> See W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2010), at 183 fn. 372.

humanity but pressure from Latin American countries in relation to enforced disappearances and from a group of primarily African states in the case of apartheid ensured that both were ultimately included in the definition of crimes against humanity in the Rome Statute.<sup>75</sup>

The formal proposal to add apartheid to the list of crimes against humanity was made by 10 countries;<sup>76</sup> the earlier proposal to include apartheid within the list of war crimes made by a sub-group of six African states was not proceeded with.<sup>77</sup> It has been asserted that the South African delegation was active in ensuring that the crime of apartheid was included in its own right and that the United States' delegation worked to ensure a narrow definition ensued.<sup>78</sup>

### ***B. The Definition of the Crime of Apartheid in the Rome Statute***

Article 7(1)(j) of the Rome Statute states that 'the crime of apartheid' is a crime against humanity when committed 'as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'. Article 7(2)(h) of the Rome Statute stipulates that for the purpose of paragraph 1:

'The crime of apartheid' means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.

Given that Article 7(1)(h) criminalizes persecution against any identifiable group or collectivity on (*inter alia*) racial or ethnic grounds, the crime of apartheid in the Rome Statute would appear to be limited to a residual category of inhuman acts

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<sup>75</sup> See further H. von Hebel and D. Robinson, 'Crimes within the Jurisdiction of the Court', in R. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results* (Kluwer Law International, 1999) 79-126, at 102.

<sup>76</sup> UN Doc. A/CONF.183/C.1/L.12, 22 June 1998, reproduced in *UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June-17 July 1998) Official Records Volume III, Reports and other documents*, at 239.

<sup>77</sup> Clark, *supra* note 29, at 619 fn. 135.

<sup>78</sup> See T. McCormack, 'Crimes Against Humanity', in D. McGoldrick et al. (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (Hart, 2004) 179-202, at 198-9.

not falling within the ambit of the concept of persecution<sup>79</sup> or ‘other inhuman acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health’<sup>80</sup> but requiring, in addition, the context of ‘of an institutionalized regime of systematic oppression and domination’ and the specific intent to maintain that regime. This residual category would appear to be either (i) any inhuman acts that did not cause great suffering, or serious injury to body or to mental or physical health or (ii) acts that did not constitute ‘the intentional and severe deprivation of fundamental rights contrary to international law’. As Dugard has noted in relation to the Apartheid Convention, proving the necessary specific intention will be difficult to establish in practice against all but the political leaders responsible for the design and implementation of the ideology of apartheid.<sup>81</sup>

### C. Conclusion

The ICTY Appeals Chamber in the *Tadić* case stated that the legal weight to be attached to the provisions of the Rome Statute had been correctly set out by Trial Chamber II in *Furundžija*.<sup>82</sup> Namely that, although still a non-binding treaty at that stage, the text ‘may be taken to express the legal position i.e. the *opinio iuris* of those States’ that attended the Rome Diplomatic Conference and adopted the Statute.<sup>83</sup> Significantly, this formulation leaves out the qualifying phrase ‘in many areas’. With regard to Article 7(1)(j) of the Rome Statute, the crime of apartheid, its absence from any universally accepted major precedent confirms that it can only be viewed as progressive development.

Clark acknowledges that the addition of the crime of apartheid to the Rome Statute was more symbolic than anything else but observes that he took great joy in watching the representatives of those states that washed their hands of the Apartheid

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<sup>79</sup> Art. 7(2)(g) ICCSt. defines persecution as ‘the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity’.

<sup>80</sup> Art. 7(1)(k) ICCSt. A marginal note to the Elements of Crime – Art. 7(1)(j) Crime against humanity of apartheid states: ‘It is understood that “character” refers to the nature and gravity of the act’.

<sup>81</sup> Dugard, *supra* note 27, at 203.

<sup>82</sup> Judgment, *Furundžija* (IT-95-17/1-T), Trial Chamber II, 10 December 1998, § 227 (‘In many areas the [Rome] Statute may be regarded as indicative of the legal views, i.e. *opinio iuris* of a great number of States.’).

<sup>83</sup> Judgment, *Tadić* (IT-94-1-A), Appeals Chamber, 15 July 1999, § 223. Judge Shahabuddeen indicated that he had reservations on the statement in the judgment of the Appeal Chamber on the relationship between the ICCSt. and the development of customary international law. See Separate Opinion of Judge Shahabuddeen, § 3.

Convention ‘sagely agreeing that the [Rome] Statute would be sadly incomplete unless something suitable including the word apartheid were added’.<sup>84</sup> Cassese argues that the fact that Article 7(1)(j) of the Rome Statute grants the ICC jurisdiction over the crime and the fact that Article 7(2)(h) provides a definition of the crime of apartheid ‘might gradually facilitate the formation of a customary rule’.<sup>85</sup> Cassese also asserts that this development could occur if a case concerning ‘inhuman acts’ committed in the context of an institutionalized regime of systematic racial oppression was ever brought before the ICC<sup>86</sup> but, given the limited nature of the ICC’s jurisdiction, this would only be a possibility where a state had accepted the existence of the crime of apartheid as a treaty obligation by virtue of their ratification of the Rome Statute.

#### IV. The Principle of Legality and the Crime of Apartheid

One of the fundamental principles of both domestic and international criminal law is the principle of legality.<sup>87</sup> The core principle of legality embodies two guiding sub-principles. First, no one should be punished unless it was sufficiently clear and certain *what* conduct was forbidden before the accused acted (the principle of certainty or *nullum crimen, nulla poena sine lege certa*). Secondly, no one should be punished for any act that was not clearly and ascertainably punishable when the act was done (the principle of non retroactivity or *nullum crimen, nulla poena sine lege praevia*).<sup>88</sup>

Article 11(2) of the Universal Declaration of Human Rights (UDHR) states

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<sup>84</sup> Clark, *supra* note 29, at 619.

<sup>85</sup> Cassese, *supra* note 26, at 13. See also *ibid.*, at 126 (acknowledging that Art. 7 is broader than customary international law but may contribute to the formation of a customary rule on the matter).

<sup>86</sup> *Ibid.*

<sup>87</sup> See generally C. Kreß, ‘Nulla poena nullum crimen sine lege’, in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Volume VII, MA-OZ (Oxford University Press, 2012) 889-899; K. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press, 2009); and M. Bassiouni, ‘Principles of Legality in International and Comparative Criminal Law’, in M. Bassiouni (ed.), *International Criminal Law: Volume 1 – Sources, Subjects and Contents* (3rd edn., Martinus Nijhoff, 2008) 73-105.

<sup>88</sup> The other two sub-principles usually associated with the principle of legality are the prohibition against analogy (*lex stricta*) and the prohibition against judge-made criminal provisions (*lex scripta*). See, further, K. Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part* (Oxford University Press, 2013), at 88-93 and Kreß, *supra* note 87, at 897-898.

No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed.<sup>89</sup>

The wording of Article 11(2) implies that the failure to incorporate an international crime into domestic law does not breach the principle of legality<sup>90</sup> but the common law conception of the rule of law goes further and requires the express incorporation of even the most heinous violations of international law into domestic law before jurisdiction over an international crime can be said to exist.<sup>91</sup>

Gallant asserts that '[t]his stronger version of legality is not required by customary international human rights law'.<sup>92</sup> Gallant also asserts that re-characterizing a crime from international law to domestic law does not raise jurisdictional issues because '[t]he forum state may characterize its criminal proceedings as an application of its own substantive criminal law on the basis of universal jurisdiction'.<sup>93</sup> Gallant acknowledges that his analysis only applies to crimes under customary international law (because customary international law applies everywhere) and that his position disregards the possibility of persistent objection.<sup>94</sup> With regard to many international crimes (particularly war crimes), the principle of foreseeability is satisfied by the fact that the conduct (e.g. murder (usually the intentional extra-judicial killing of non-combatants)) is clearly criminal under every domestic legal system in the world.<sup>95</sup>

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<sup>89</sup> This wording has been replicated in numerous human rights treaties (both regional and international) and now represents a customary norm. See International Law Association, Committee on the Enforcement of Human Rights Law, *Final Report on the Status of the Universal Declaration of Human Rights in National and International Law*, Report of the 66<sup>th</sup> Conference (Buenos Aires, 1995) 525-599, at 547; Gallant, *supra* note 87, at 352ff; and Kreß, *supra* note 87, at 893 [§15].

<sup>90</sup> See also M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl am Rhein: N. P. Engel, Publisher, 1993), at 276 who notes that it is clear from the discussions in the 3<sup>rd</sup> Committee of the UNGA that international law included both treaty and customary international law.

<sup>91</sup> See *Nulyarimma v. Thompson* (1999) 165 ALR 621 (FCA) (genocide); *Ex parte Pinochet (No.3)* [2000] 1 AC 147 (HL) (torture); and *R v. Jones* [2006] UKHL 16; [2007] 1 AC 136 (aggression). But see also *Polyukhovich v. Commonwealth of Australia* (1991) 172 CLR 501 (HCA) and *R v. Finta* [1994] 1 SCR 701 recognising that retrospective legislation can be applied to war crimes.

<sup>92</sup> Gallant, *supra* note 87, at 370.

<sup>93</sup> Gallant, *supra* note 87, at 371.

<sup>94</sup> Gallant, *supra* note 87, at 371 fn. 78.

<sup>95</sup> See, for example, *Polyukhovich*, *supra* note 91 and *Finta*, *supra* note 91. But see also Grand Chamber Judgment, *Kononov v. Latvia*, ECtHR [GC], App. No. 36376/04, [2010] ECHR 667, 17 May 2010 and the critical comments in A. Cassese et al., *International Criminal Law: Cases and Commentary* (Oxford University Press, 2011), at 72.

## V. Conclusion

In 2004, the South African Constitutional Court stated that, '[i]t is also clear that the practice of apartheid constituted crimes against humanity and some of the practices of the apartheid government constituted war crimes'.<sup>96</sup> The authorities given for this conclusion were the 1968 Convention, Article 1 of the Apartheid Convention, and John Dugard's observation in a case note on the *AZAPO* case that the two conventions and the fact that apartheid had been labelled as a crime against humanity in numerous UNGA resolutions 'have led to widespread acceptance that the practices of Apartheid constituted crimes against humanity'.<sup>97</sup> For the reasons given above, neither the 1968 Convention nor the Apartheid Convention however, support the existence of a customary international crime. Further, Dugard's position is rather more nuanced than the South African Constitutional Court acknowledged: in fact, Dugard stated that, 'the precise status of the crime of apartheid is today uncertain' and that 'it *may* be a crime against humanity under customary international law'.<sup>98</sup>

The particular significance of the Rome Statute is that, for the first time, apartheid has been criminalized in a manner that is consistent with penal legality and certainty. In *R v. Finta*, the Canadian Supreme Court noted that '[t]he strongest source in international law for crimes against humanity, however, are the common domestic prohibitions of civilized nations'.<sup>99</sup> As noted in the introduction, the incorporation of new international crimes into the domestic criminal law of states is essential to ensure both normative alignment and source legitimacy for these transformative initiatives. Unfortunately, in the case of the crime of apartheid, domestic implementation has not been uniform.

In 1993, for example, when Belgium acted to incorporate serious violations of the Geneva Conventions of 1949 and the Additional Protocols I and II of 1977 under the Act on the Punishment of Grave Breaches of International Humanitarian Law, the legislation did not cover crimes later incorporated into the Rome Statute such as the crime of apartheid as a crime against humanity (although this was incorporated as a war crime). In 1999, when the Belgian Parliament incorporated the provisions relating

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<sup>96</sup> *S v. Basson* [2004] ZACC 13; 2005 (1) SA 171 (CC), at 189 [§ 37].

<sup>97</sup> Dugard, *supra* note 65, at 263.

<sup>98</sup> Dugard, *supra* note 45, at 159-160 (emphasis added). See also Dugard, *supra* note 27, at 206 and J. Gebhard, 'Apartheid', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Volume I, AA to AC (Oxford University Press, 2012) 461-468, at 467 [§ 25].

<sup>99</sup> *R v. Finta* [1994] 1 SCR 701, at 716-717.

to crimes against humanity in the Rome Statute into Belgian law, the enforced disappearance of persons, the crime of apartheid and other inhumane acts of a similar character were omitted. With regard to enforced disappearances and other inhumane acts, Vandermeersch asserts that these omissions would appear to have been oversights but, with regard to the crime of apartheid, the Belgian Parliament considered the definition in the Rome Statute 'to be framed in terms too broad to be compatible with the requirement of legal certainty'.<sup>100</sup> These omissions were rectified in 2003 when Belgium corrected its legislation by inserting the omitted crimes into its domestic law.<sup>101</sup> Likewise Germany has incorporated the crime of apartheid into its domestic law in a manner that deviates from the Rome Statute 'in order to meet the requirements of legal certainty under the German Constitution'.<sup>102</sup>

The 'copy-out' technique<sup>103</sup> (i.e. cutting and pasting the relevant sections of the Rome Statute) adopted by the United Nations Transitional Administration in East Timor (UNTAET)<sup>104</sup> is indicative of how the process of incorporating apartheid into the list of customary international law crimes is likely to develop but regard should also be had to the view of the Secretary-General (in relation to the competence *ratione materiae* of the proposed ICTY) that

the application of the principle of *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of the adherence of some but not all States to specific conventions does not arise.<sup>105</sup>

Given this advice and the fact that the crime of apartheid was not included in the Statute of the ICTY, the statement in the *Tadić* case that '[a]dditional codifications of international law have also confirmed the customary law status of the prohibition of

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<sup>100</sup> D. Vandermeersch, 'The ICC Statute and Belgian Law', 2 *JICJ* (2004) 133-157, at 136 fn. 23.

<sup>101</sup> *Ibid.*

<sup>102</sup> G. Werle and F. Jessberger, 'International Criminal Justice is Coming Home: The New German Code of Crimes Against International Law', 13 *CLF* (2002) 191-223, at 206.

<sup>103</sup> The term 'copy-out' is a term of art describing a particular manner of implementing European Union Directives into national law which seeks to reduce the burden of implementation by replicating the exact language used in the Directive.

<sup>104</sup> See, generally, K. Ambos and S. Wirth, 'The Current Law of Crimes Against Humanity: An Analysis of UNTAET Regulation 15/2000', 13 *CLF* (2002) 1-90.

<sup>105</sup> *Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993)*, UN Doc. S/25704, 3 May 1993, at 9 [§ 34].

crimes against humanity, as well as two of its most egregious manifestations: genocide and apartheid'<sup>106</sup> seems somewhat ill-considered vis-à-vis apartheid.

Although both Additional Protocol I and the Rome Statute have been widely ratified, there are a number of states that remain non-parties to both treaties. With regard to the Rome Statute, only 120 countries voted in favour of adoption, seven (including the United States, China and Israel) voted against and another 21 states abstained. As Bethlehem has noted, '[i]f States have objections to particular treaty-based rules, those objections will subsist as regards the formulation of the rules in a customary format'.<sup>107</sup>

Two crucial further facts also mitigate against a conclusion that apartheid is a crime against humanity under customary international law. First, notwithstanding the number of ratifications of the Apartheid Convention, it is remarkable that the vast majority of the parties to the Apartheid Convention failed to incorporate the crime of apartheid into their domestic law prior to the drafting of the Rome Statute,<sup>108</sup> and, secondly, the position taken by South Africa — still not a party to the Apartheid Convention — in the conjoined *In Re South African Apartheid Litigation* cases (i.e. its failure to assert that apartheid *per se* was a very serious crime under international law).<sup>109</sup>

The new edition of *Cassese's International Criminal Law* acknowledges that Article 7 of the Rome Statute is broader than customary international law (because 'it broadens the classes of conduct amounting to crimes against humanity') in relation to the crime of apartheid but states that 'it could be argued that the [Rome] Statute has, however, contributed to recent formation of a customary rule on the matter'.<sup>110</sup>

It is questionable whether the incorporation of the crime of apartheid into the domestic law of states that are parties to the Rome Statute can contribute to the formation of a customary rule because, as the ICJ observed in the *North Sea*

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<sup>106</sup> Judgment, *Tadić* (IT-94-1-T), Trial Chamber, 7 May 1997, at § 622.

<sup>107</sup> D. Bethlehem, 'The methodological framework of the study', in E. Wilshurst and S. Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge University Press, 2007) 3-14, at 7.

<sup>108</sup> See Amnesty International, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World* (2011) and note the frequent statements that 'apartheid is not defined/included in the Penal Code [of state X] ... , so prosecutions would have to be for ordinary crimes' in relation to states that are parties to the Apartheid Convention.

<sup>109</sup> See 346 F. Supp. 2d 538 (S.D.N.Y. 2004), at 553.

<sup>110</sup> Cassese et al., *supra* note 37, at 107. The other crimes included by the authors in this category are 'forced pregnancy' and 'enforced disappearance of persons'.



*Continental Shelf Cases*, no inference can legitimately be drawn as to the existence of a rule of customary law contained in a treaty provision from the behaviour of the parties to the treaty.<sup>111</sup> Of course, for a treaty with such widespread ratification as the Rome Statute (currently 122 parties), it becomes increasingly difficult to demonstrate state practice by states who are not parties, the so-called Baxter Paradox.<sup>112</sup> Meron has argued that Baxter overstated the nature and effect of the ICJ's statement that the practice of the parties to a convention lacks evidentiary weight in the creation of customary law and quotes the statement of the ICJ that 'very widespread and representative participation' in a convention 'might suffice of itself' to create a general rule of international law.<sup>113</sup>

The most promising development for those wishing to assert the customary status of the crime of apartheid is the use of the copy-out technique in defining crimes against humanity in the African Union (AU) Model National Law on Universal Jurisdiction over International Crimes recommended for adoption by African Ministers of Justice and Attorney Generals in their meeting held in Addis Ababa on 14 and 15 May 2012.<sup>114</sup> At its 19<sup>th</sup> Summit held in Addis Ababa in July 2012, the AU Assembly passed a decision encouraging AU Member States 'to fully take advantage of this Model National Law in order to expeditiously enact or strengthen their National Laws in this area'.<sup>115</sup> It should be stressed that in order for the principle of legitimacy to be fully respected, it will be the adoption of this Model National Law into the domestic law of AU member states (and particularly those states who are not parties to the Rome Statute if the Baxter paradox is a reality) that will strengthen the argument for the crystallization of the crime of apartheid (as defined in the Rome Statute) as a customary crime against humanity under international law.

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<sup>111</sup> *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands)*, 20 February 1969, ICJ Reports (1969) 3, at 43 [§ 76].

<sup>112</sup> See R. Baxter, 'Treaties and Custom', 129 *Recueil des cours* (1970 I) 27-105, at 64 and 73. See also Judgment, *Delalić and others* (IT-96-21-T), Trial Chamber, 16 November 1998, at §§ 302-303.

<sup>113</sup> T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon Press, 1989), at 50-52 quoting *North Sea Continental Shelf*, *supra* note 111, at 42 [§ 73].

<sup>114</sup> Available online at <http://www.ejiltalk.org/wp-content/uploads/2012/08/AU-draft-model-law-UJ-May-2012.pdf> (visited 30 June 2013).

<sup>115</sup> 'Decision on the Implementation of the Decisions of the International Criminal Court (ICC)', Doc. EX.CL/731 (XX1), Assembly/AU/Dec.419(XIX), at § 11.